

FILED COPY

1 **DYKEMA GOSSETT LLP**
2 S. Christopher Winter, SBN: 190474
3 kwinter@dykema.com
4 Walead Esmail, SBN: 266632
5 wesmail@dykema.com
6 333 South Grand Ave, Suite 2100
7 Los Angeles, CA 90071
8 Tel.: (213) 457-1800
9 Fax: (213) 457-1850

10 Attorneys for Plaintiff
11 RASCAL VIDEO, LLC

12 2012 DEC 11 AM 10:12

13 CLERK U.S. DISTRICT COURT
14 CENTRAL DIST. OF CALIF.
15 LOS ANGELES

16 BY: _____

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **WESTERN DIVISION**

20 RASCAL VIDEO, LLC, a California
21 limited liability company,

22 Case No. 12-CV-09675 SVW (JCx)

23 Plaintiff,
24 vs.
25 WSM INVESTMENT, LLC D/B/A
26 TOPCO SALES, an unknown entity;
27 WSM SALES, LLC, a Delaware limited
28 liability company; WORLD SEXY
MANUFACTURING INVESTMENT,
LLC, an unknown entity; VAST
RESOURCES, INC., a California
corporation; SCOTT TUCKER, an
individual, and DOES 1-10, inclusive,

29 **FIRST AMENDED COMPLAINT
FOR DECLARATORY RELIEF, SET
ASIDE OF FRAUDULENT
TRANSFER, BREACH OF
CONTRACT, TRADEMARK
INFRINGEMENT, AND UNFAIR
COMPETITION**

30 **JURY TRIAL DEMANDED**

31 Defendants.

32 Plaintiff Rascal Video, LLC ("Rascal"), for its First Amended Complaint
33 against defendants WSM Investment, LLC ("WSMI" or "New Topco"), WSM Sales,
34 LLC ("WSM Sales"), World Sexy Manufacturing Investment, LLC ("World Sexy"),
35 Vast Resources, Inc. ("Vast Resources" or "Old Topco"), Scott Tucker ("Tucker"),
36 and DOES 1-10, inclusive (collectively "Defendants"), alleges as follows:
37

38

39

1 INTRODUCTION

2 1. Rascal and Vast Resources d/b/a Topco Sales ("Old Topco") entered
3 into an exclusive license agreement in May 2004 (the "License Agreement") whereby
4 Rascal authorized Old Topco to manufacture and distribute adult novelty items under
5 Rascal's valuable trademarks. Old Topco's performance under the License
6 Agreement declined over the years, and since at least 2008 Topco was frequently
7 unable to fulfill customer orders in a timely manner, among other problems. In
8 March 2011 Rascal terminated the License Agreement pursuant to its terms. Old
9 Topco disputed Rascal's termination but stopped paying Rascal royalties under the
10 License Agreement after September, 2011.

11 2. In July 2012, Rascal learned that Old Topco had purported to make a
12 general assignment for the benefit of creditors ("ABC"). Rascal also learned that the
13 assignee had sold all of the assets of Old Topco to defendant WSMI, which is owned,
14 at least in part, by the owners of Old Topco. WSMI thereupon commenced doing
15 business as "Topco Sales" (i.e., New Topco) in the same location and with many of
16 the same employees as Old Topco. Notwithstanding Rascal's termination of the
17 License Agreement with Old Topco, New Topco purports to have acquired the
18 License Agreement from Old Topco's assignee, and continues to exploit the
19 trademarks licensed to Old Topco. Rascal seeks an order from this Court declaring
20 the License Agreement terminated, enjoining New Topco from further infringing
21 Rascal's marks, and setting aside the fraudulent transfer of Old Topco's assets to
22 New Topco. Rascal also seeks damages from Old Topco for breach of contract for
23 unpaid royalties under the License Agreement and damages from New Topco for its
24 willful infringement of Rascal's marks.

25 THE PARTIES

26 3. Plaintiff Rascal is a limited liability corporation organized under the
27 laws of the State of California with its principal place of business in Los Angeles,
28 California. Rascal produces and distributes adult films and other adult content under

1 its registered trademark CHI CHI LARUE (U.S. Registration #3226799) and
2 common law trademarks and trade names, including CHANNEL 1 RELEASING,
3 RASCAL VIDEO, and LIVE AND RAW (collectively the "RASCAL MARKS,").
4 Rascal, through a predecessor in interest, also owns trademark rights in the mark
5 DDIRK YATES.

6 4. Defendant WSMI is a business entity of unknown origin that conducts
7 business in the State of California, County of Los Angeles. Rascal is informed and
8 believes, and on that basis alleges, that WSMI is currently doing business as Topco
9 Sales, and under that name is engaged in the business of manufacturing, distributing,
10 selling, and marketing adult novelty products and sexual aids. Rascal is informed and
11 believes, and on that basis alleges, that WSMI is owned and/or controlled, in whole
12 or in part, by the owners of defendant Vast Resources.

13 5. Defendant WSM Sales is a Delaware limited liability company doing
14 business in California at the same address as WSMI. Rascal is informed and
15 believes, and on that basis alleges, that WSM sales is the alter-ego of WSMI.

16 6. Defendant World Sexy is a business entity of unknown origin. Rascal is
17 informed and believes, and on that basis alleges, that World Sexy is the alter-ego of
18 WSMI or is a fictitious name used to refer to WSMI.

19 7. Rascal is informed and believes, and on that basis alleges, that defendant
20 Vast Resources is a corporation organized under the laws of the State of California
21 with its principal place of business in Los Angeles, California. Until about July,
22 2012, Vast Resources did business as Topco Sales, and under that name engaged in
23 the business of manufacturing, distributing, selling, and marketing adult novelty
24 products and sexual aids.

25 8. Rascal is informed and believes, and on that basis alleges, that defendant
26 Tucker is an individual residing in the County of Los Angeles, California. Rascal is
27 informed and believes, and on that basis alleges, that Tucker owns all or part of Old
28 Topco and New Topco, and that Tucker controls, or has the right to control, Old

1 | Topco and New Topco.

2 9. Plaintiff does not know the true names and capacities of defendants
3 DOES 1-10, inclusive, and sues these Defendants by such fictitious names. Plaintiff
4 is informed and believes and on that basis alleges that each of the defendants
5 fictitiously named as DOES 2-10 is responsible in some manner for and caused the
6 damages herein alleged. When Plaintiff ascertains the true names and capacities of
7 DOES 2-10, it will amend this Complaint accordingly.

8 10. On information and belief, each defendant aided and abetted the actions
9 of one or more of the other defendants as set forth below, in that each defendant had
10 knowledge of the actions or omissions of the other defendants and encouraged,
11 assisted or facilitated those acts or omissions. Each of the defendants was the agent of
12 each of the remaining defendants, and in doing the things hereinafter alleged, was
13 acting within the course and scope of such agency and with the permission and
14 consent of the other defendants.

JURISDICTION AND VENUE

16 11. Jurisdiction is proper in this Court because this litigation arises under
17 federal law, namely 17 U.S.C. § 1051 *et seq.* (Lanham Act). The Court has
18 jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C.
19 § 1338(a), (b) (trademark and unfair competition). This Court has supplemental
20 jurisdiction over Rascal's state law claims under 28 U.S.C. § 1367.

21 12. This Court has personal jurisdiction over defendants WSMI, WSM
22 Sales, World Sexy and Vast Resources (the “Corporate Defendants”) because the
23 Corporate Defendants do business in this judicial district and can be found in this
24 judicial district.

25 13. This Court has personal jurisdiction over Tucker because Tucker resides
26 in and/or can be found within this judicial district.

27 14. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(c).

FACTUAL BACKGROUND

15. Since at least as early as 1990, Rascal (or its predecessor) began using
2 the RASCAL MARKS and the DIRK YATES mark on goods in commerce. By
3 virtue of its longstanding use of the RASCAL MARKS and DIRK YATES mark,
4 Rascal has developed a valuable reputation for quality and goodwill associated with
5 its marks.

16. On or about May 6, 2004, Rascal entered into a trademark license
7 agreement (the "License Agreement") with Vast Resources whereby Rascal licensed
8 to Old Topco, *inter alia*, the right to exploit the RASCAL MARKS in connection
9 with the design, manufacture, advertising, promotion, sale, and distribution of certain
10 adult novelty products and sexual aids, including, *inter alia*, molded body parts.

17. The License Agreement required Old Topco to make quarterly royalty
12 payments to Rascal with accompanying royalty statements no later than forty-five
13 (45) days after the end of the preceding calendar quarter.

18. The License Agreement also required Old Topco to obtain design
15 approval from Rascal for all products sold under the RASCAL MARKS.

19. The License Agreement allows Rascal to terminate the License
17 Agreement after 60 days written notice if, *inter alia*, Old Topco becomes insolvent or
18 "makes an assignment for benefit of creditors or similar disposition of its assets."

20. The License Agreement provides for an initial term from May 10 2004
21 to May 9, 2012 (subject to earlier termination pursuant to other terms of the License
22 Agreement). The License Agreement further provides that upon expiration of the
23 original term, Old Topco shall have the right to extend the term of the License
24 Agreement an additional eight years, so long as Old Topco is not in default under the
25 terms of the License Agreement at the time of exercise.

26. The License Agreement provides that after expiration or termination of
27 the License Agreement, the RASCAL MARKS are to revert to Rascal. Old Topco is
28 authorized to continue selling inventory existing at the time of expiration or

1 termination for an additional one year thereafter (and to pay royalties thereupon to
2 Rascal), but not to create, manufacture or distribute new products or manufacture
3 additional existing products.

4 22. In or about 2008, Old Topco began to manufacture and distribute goods
5 under the DIRK YATES mark, without Rascal's authorization or consent.

6 23. On March 11, 2011, Rascal notified Old Topco that it was terminating
7 the License Agreement for, among other things, failure to pay royalties and provide
8 royalty statements in a timely manner. Rascal also notified Old Topco that it was not
9 authorized to use the DIRK YATES mark and that such use was therefore infringing.

10 24. On May 19, 2011, Rascal reiterated its termination of the License
11 Agreement, and noted that Old Topco had failed to cure within 60 days of demand its
12 default of its obligation to provide royalty statements.

13 25. Old Topco paid Rascal a royalty payment for the third quarter of 2011
14 but thereafter ceased royalty payments to Rascal under the License Agreement.

15 26. On or about July 2012, Rascal learned that Old Topco had purported to
16 make a general assignment for the benefit of creditors ("ABC"), and that its assignee
17 had thereafter sold the assets of Old Topco to New Topco.

18 27. At the time of the purported ABC, Old Topco was in default of the
19 fourth quarter 2011 royalty payment and the first quarter 2012 royalty payment, as
20 well as the required royalty statements associated with those payments.

21 28. At the time of the purported ABC, Old Topco owed Rascal at least
22 \$60,000 in unpaid royalties under the License Agreement.

23 29. Rascal never received formal notice of the assignment. Rascal never
24 received a final statement of sales through the date of the ABC, has not received any
25 instructions on how to submit a claim to the assignee, and has not received any
26 response to its request for an inventory of licensed product in the possession of Old
27 Topco at the time of the ABC.

28 30. On information and belief, New Topco is owned and controlled, in

1 whole or in part, by the same person(s) who own Old Topco. New Topco operates
2 from the same offices as had Old Topco, with all or almost all of the same employees.
3 Among others, defendant Tucker was the president of Old Topco and is the CEO of
4 New Topco.

5 31. On information and belief, the transfer of Old Topco's assets to New
6 Topco was "in place," that is, possession of the assets was never taken by the
7 assignee.

8 32. On information and belief, New Topco did not pay fair value for the
9 assets of Old Topco.

10 33. In July 2012, Rascal again notified Old Topco that the License
11 Agreement was terminated.

12 34. In July 2012, Rascal notified New Topco that it was not authorized to
13 distribute goods under the RASCAL MARKS or the DIRK YATES mark and
14 demanded that it cease and desist from further infringement of Rascal's marks.

15 35. Since the ABC, New Topco has denied any obligation to pay the
16 royalties due from Old Topco prior to the ABC. However, defendant Tucker has told
17 Rascal that New Topco would pay the Old Topco royalties to Rascal if Rascal agreed
18 to enter into a new agreement with New Topco.

19 36. On information and belief, New Topco falsely represents to others that it
20 is authorized to manufacture and distribute goods under the RASCAL MARKS and
21 the DIRK YATES mark.

22 37. On information and belief, New Topco has manufactured and distributed
23 and continues to manufacture and distribute goods under the Rascal Mark after the
24 termination of the License Agreement.

25 38. On information and belief, New Topco has manufactured and distributed
26 and continues to manufacture and distribute goods under the DIRK YATES mark
27 without authorization from Rascal.

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT

(Declaratory Relief Act, 28 U.S.C. § 2201)

(Against Old Topco and New Topco)

5 39. Rascal hereby repeats and realleges Paragraphs 1-38 above as though
6 fully set forth herein.

7 40. An actual case or controversy has arisen between Rascal, on the one
8 hand, and Vast Resources and WSMI, on the other hand, regarding their respective
9 rights and obligations under the License Agreements (if any).

10 41. On information and belief, Vast Resources and WSMI contend that
11 Rascal did not effectively terminate the License Agreement, that Old Topco renewed
12 the License Agreement for an additional eight years on May 9, 2012, prior to the
13 ABC, and that the License Agreement has now been assigned to New Topco.

14 42. Rascal asserts that the License Agreement was terminated on, at the
15 latest, May 11, 2011; that even if the License Agreement was not effectively
16 terminated in May 2011, it terminated by its terms on May 9, 2012 (because Old
17 Topco was in default of its payment obligations and not entitled to renew on that
18 date), and that as such New Topco was not assigned the License Agreement under the
19 ABC and has no rights thereunder.

20 43. New Topco has announced that it intends to, and has continued to,
21 manufacture, distribute, sell, and market adult products internationally under the
22 RASCAL MARKS despite termination of the License Agreement.

23 44. Rascal has suffered and will continue to suffer harm in the absence of a
24 declaration of the parties' respective rights under the License Agreement.

25 45. Rascal desires a judicial determination that: (i) the License Agreement
26 was terminated by Rascal on or about March 11, 2011, and such termination became
27 effective no later than May 10, 2011; (ii) in the alternative, in the event that the Court
28 determines that the License Agreement was not effectively terminated in March 2011,

1 that it expired by its terms on May 9, 2012 and could not have been renewed at that
2 time because Old Topco was in default of the License Agreement on that date; and
3 (iii) that the terminated License Agreement was not properly transferred to New
4 Topco in the ABC, and New Topco has no rights thereunder.

5 **SECOND CAUSE OF ACTION**

6 **SET ASIDE OF FRAUDULENT TRANSFER**

7 (Uniform Fraudulent Transfers Act, Cal. Civ. Code § 3439 *et seq.*)

8 (Against Old Topco and New Topco)

9 46. Rascal hereby repeats and realleges Paragraphs 1-45 above as though
10 fully set forth herein.

11 47. Rascal is a creditor of Old Topco to whom a debt is owed by Old Topco.

12 48. On information and belief, Old Topco's general assignment of assets to
13 DOE 1 was made with actual intent to hinder, delay, or defraud Rascal.

14 49. On information and belief, Old Topco's general assignment of assets to
15 DOE 1 was made without receiving equivalent value and when Old Topco was
16 insolvent.

17 50. On information and belief, New Topco conspired with and aided and
18 abetted Old Topco's fraud in order to obtain the assets of Old Topco at less than their
19 fair value in order to defraud and hinder the creditors of Old Topco.

20 51. Rascal has been harmed by the conduct described herein, in that the
21 ABC put beyond Rascal's reach property that would have otherwise been available to
22 satisfy Old Topco's debt to Rascal.

23 52. Rascal requests that the purported ABC be voided and set aside, that
24 New Topco and Tucker be enjoined from further transfers of Old Topco's assets, and
25 that a receiver be assigned to manage Old Topco.

26 53. Rascal requests its reasonable attorneys' fees and costs in connection
27 with this Second Cause of Action.

28

THIRD CAUSE OF ACTION

BREACH OF CONTRACT

(Against Old Topco)

54. Rascal hereby repeats and realleges Paragraphs 1-53 above as though fully set forth herein.

55. The License Agreement is a terminated valid and binding contract between Rascal and Old Topco.

56. Rascal has fully performed its obligations under the License Agreement

57. Pursuant to the terms of the License Agreement, Old Topco is required to pay royalties to Rascal on a quarterly basis no later than forty-five (45) days after the end of the preceding calendar quarter.

58. Pursuant to the terms of the License Agreement, Old Topco is required to provide Rascal with a complete and accurate royalty statement with each quarterly payment.

59. Old Topco breached the License Agreement by failing to pay royalties for sales of licensed products from October 1, 2011 through the date of the purported ABC.

60. As a result of the foregoing conduct, Rascal is entitled to damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

(15 U.S.C. § 1125(a); Lanham Act § 43(a))

(Against New Topco and Tucker)

61. Rascal hereby repeats and realleges Paragraphs 1-60 above as though
fully set forth herein.

5 62. Since at least 1990, Rascal has been using the RASCAL MARKS and
7 the DIRK YATES mark in commerce. Consumers recognize the RASCAL MARKS
8 and DIRK YATES mark as originating from Rascal. Rascal has established

1 significant common law trademark rights in connection with its RASCAL MARKS
2 and DIRK YATES mark in connection with adult novelty items and molded body
3 parts.

4 63. By virtue of its longstanding use of the RASCAL MARKS and DIRK
5 YATES mark, Rascal has developed a valuable reputation for quality and goodwill
6 associated with its marks.

7 64. New Topco's use of the RASCAL MARKS and DIRK YATES mark in
8 connection with the continuing manufacture, distribution, sale, and promotion of
9 goods is not authorized by Rascal and is likely to cause, and has caused, a likelihood
10 of confusion among members of the public regarding the origin, sponsorship, and
11 endorsement of goods sold or offered by New Topco.

12 65. As a direct and proximate result of New Topco's unlawful conduct,
13 Rascal has and will continue to suffer substantial harm and injury to its business,
14 goodwill, and reputation. Unless enjoined, New Topco's conduct will continue to
15 cause Rascal immediate and irreparable injury.

16 66. By engaging in the conduct alleged herein, New Topco intended to trade
17 on Rascal's reputation, thereby entitling Rascal to New Topco's profits, Rascal's
18 damages, and the costs of the action.

19 67. Defendant Tucker actively and knowingly caused the conduct of New
20 Topco alleged herein, thereby rendering him individually liable for the harm such
21 conduct caused to Rascal.

22 **FIFTH CAUSE OF ACTION**

23 **TRADEMARK INFRINGEMENT**

24 (Against New Topco and Tucker)

25 68. Rascal hereby repeats and realleges Paragraphs 1-67 above as though
26 fully set forth herein.

27 69. Rascal is the senior user of the RASCAL MARKS and DIRK YATES
28 mark.

1 70. The general public has come to associate the RASCAL MARKS and
2 DDIRK YATES mark with Rascal and with goods and services endorsed by Rascal.

3 71. Rascal has built up considerable goodwill in the RASCAL marks and
4 DDIRK YATES mark.

5 72. On information and belief, since about July 2011 New Topco has been
6 using the RASCAL MARKS and DDIRK YATES mark without Rascal's permission
7 or consent, and in competition with Rascal on identical or similar goods.

8 73. New Topco's unlawful acts violate Rascal's trademark rights under
9 California common law and are likely to cause consumer confusion as to the origin or
10 sponsorship of the goods sold or offered by New Topco.

11 74. New Topco's unlawful acts violate Rascals' rights in the registered mark
12 CHI CHI LARUE under federal trademark law and are likely to cause consumer
13 confusion as to the origin or sponsorship of the goods sold or offered by New Topco.

14 75. New Topco's acts of trademark infringement have been committed with
15 the intent to, and have caused, confusion, mistake, or deception.

16 76. As a direct and proximate result of New Topco's unlawful conduct,
17 Rascal has suffered and will continue to suffer substantial harm and injury to its
18 business, goodwill, and reputation. Unless enjoined, New Topco's conduct will
19 continue to cause Rascal immediate and irreparable injury.

20 77. New Topco's acts of trademark infringement are willful, intentional, and
21 committed with malice to harm Rascal's business. Rascal therefore seeks to recover
22 enhanced damages and attorneys' fees.

23 78. Tucker actively and knowingly directed the infringing conduct of New
24 Topco alleged herein, thereby rendering him individually liable for the harm such
25 infringement caused to Rascal.

26

27

28

SIXTH CAUSE OF ACTION

CALIFORNIA UNFAIR COMPETITION

(Cal. Bus. & Prof. Code § 17200)

(Against New Topco)

79. Rascal hereby repeats and realleges Paragraphs 1-78 above as though fully set forth herein.

80. New Topco has infringed, appropriated, used and adopted the RASCAL MARKS and DIRK YATES mark with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent of causing harm to Rascal's business.

81. New Topco's conduct constitutes an "unlawful, unfair or fraudulent business act or practice" and an "unfair, deceptive, untrue or misleading advertising" within the meaning of California Business & Professions Code Section 17200.

82. Rascal has been damaged by New Topco's conduct as alleged herein.

83. As a consequence of New Topco's unlawful actions, Rascal is entitled to injunctive relief and an order that New Topco disgorge any and all profits made on the manufacture, use, display, or sale of its infringing goods.

PRAYER FOR RELIEF

WHEREFORE, Rascal respectfully prays the following relief:

1. A declaratory judgment that the License Agreement was terminated on May 11, 2011;
2. In the alternative, a declaratory judgment that the License Agreement expired by its terms on May 9, 2012, and Old Topco was not entitled to renew because of its default on its payment obligations;
3. A declaratory judgment that New Topco does not have any rights under the License Agreement;
4. An order permanently enjoining New Topco, its subsidiaries, officers,

1 affiliates, agents, directors, shareholders, parent corporations,
2 employees, partners, representatives, licensees, related companies,
3 assigns, attorneys and any and all persons, entities, or agents in active
4 concert or participation with Defendant, to refrain from manufacturing,
5 distributing, selling, marketing, or in any other way exploiting the
6 RASCAL MARKS and DIRK YATES mark, and from competing
7 unfairly with Rascal in any manner and from otherwise damaging
8 Rascal's goodwill or business reputation:

- 9 5. An order requiring New Topco to destroy and cease exploiting in any
10 way the molded body parts that embody Rascal's intellectual property
11 rights;
- 12 6. Order an accounting from both New Topco and Old Topco identifying
13 all sales of products under the License Agreement and an inventory of
14 all product manufactured under or in violation of the License
15 Agreement;
- 16 7. Order that New Topco be required to account for any and all profits
17 earned as a result of its unlawful acts;
- 18 8. Award Rascal damages and lost profits in amount to be proven at trial;
- 19 9. Grant an award of punitive damages for the willful and wanton nature of
20 Defendant's infringement of Rascal's intellectual property;
- 21 10. Grant an award of Rascal's costs, expenses, and reasonable attorneys'
22 fees in this action;
- 23 11. Grant such other further relief to which Rascal may be entitled as a
24 matter of law or equity, or which the Court determines to be just and
25 proper.

DYKEMA GOSSETT LLP
333 SOUTH GRAND AVENUE, SUITE 2100
LOS ANGELES, CALIFORNIA 90071

1
DEMAND FOR JURY TRIAL

2 Pursuant to Federal Rule of Civil Procedure 38 Rascal hereby demands a jury
3 trial on all issues so triable.

4 Dated: December 10, 2012

5 DYKEMA GOSSETT LLP
S. Christopher Winter
Walead Esmail

6 By: 

7
8 S. Christopher Winter
9 Attorneys for Plaintiff
RASCAL VIDEO, LLC

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
DYKEMA GOSSETT LLP
333 SOUTH GRAND AVENUE, SUITE 2100
LOS ANGELES, CALIFORNIA 90071